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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Part 1 of the)
Commission's Rules --)
Competitive Bidding Procedures)

WT Docket No. 97-82

To: The Commission

PETITION FOR RECONSIDERATION

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Submitted by:

COMMUNITY TELEPLAY, INC.

Myers Keller
Communications Law Group
1522 K Street, N.W.
Suite 1100
Washington, DC 20005

January 30, 1998

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SUMMARY

Community Teleplay, Inc. ("CTI"), by its attorneys, hereby petitions the Commission to reconsider the amendments to Part 1 of the Commission's rules set forth in the Third Report and Order, WT Docket No. 97-82, which eliminate grace period requests in favor of automatic grace periods for current licensees making installment payments to the Commission. The amendments to Section 1.2110(e) should not apply to IVDS licensees currently making payments under the Commission's installment payment program, because such amendments constitute an impermissible retroactive rulemaking.

When choosing the installment payment program, eligible IVDS licensees entered into a financial agreement with the Commission for the payment of their license. The Commission issued a license in exchange for the licensee's promise to make installment payments. Former Section 1.2110(e) of the Commission's rules sets forth the rights and obligations of the parties to that agreement with respect to payment, default and grace period requests. The Commission cannot unilaterally change the terms of the agreement by retroactive rulemaking. Therefore, the amended Section 1.2110(e) set forth in the Third Report and Order cannot apply to the Commission's financial agreements with IVDS licensees.

segment B). CTI obtained its license in the Commission's 1994 IVDS auction where it qualified as a small business designated entity and elected to pay its bid amount through the Commission's installment payment plan.

3. As the Commission is aware, the IVDS industry has encountered unforeseen obstacles that have caused the industry to reinvent itself. The Commission allocated the IVDS spectrum to serve as a return path from TV set-tops for interactive television ("ITV") applications.³ ITV equipment and application developers, however, failed to develop commercially viable equipment and applications, thereby forcing IVDS licensees to start from ground zero in developing this spectrum.

4. CTI believes that IVDS holds great potential. CTI has worked diligently to build out a commercially viable IVDS system. It is making progress. CTI is in the process of deploying its first IVDS cell site in the Norfolk-Virginia Beach MSA which will be used to demonstrate a state-of-the-art vehicle tracking service. Three and one-half years after the July, 1994 IVDS auction, commercially viable, IVDS equipment has only now become available for CTI to deploy in its market. CTI estimates that it will take a similar length of time to develop its IVDS network into a successful business. CTI submits that its situation --

³ See In the Matter of Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules to Provide Interactive Video and Data Services, GEN Docket No. 91-2, Report and Order, 7 FCC Rcd 1630 (1992).

that of a small business that has had to completely start over following the failure of IVDS-based ITV -- is precisely the type of situation that creates the "financial distress" that the former grace period provisions were meant to accommodate and which the amended rules do not. CTI, in anticipation of defaulting on its installment payments, has filed grace period requests pursuant to the current Section 1.2110(e)(4)(ii) of the Commission's rules for installment payments that are or will become due.⁴

5. Section 1.2110(e)(4)(i) states that an entity making installment payments will be in default if it fails to make payment within 90 days of the payment due date. 47 C.F.R.

1.2110(e)(4)(i). Current Section 1.2110(e)(4)(ii) states that:

[u]pon default or in anticipation of default of one or more installment payments, a licensee may request that the Commission permit a three to six month grace period, during which no installment payments need be made. In considering whether to grant a request for a grace period, the Commission may consider, among other things, the licensee's payment history, including whether the licensee has defaulted before, how far into the license term the default occurs, the reasons for default, whether the licensee has met construction build-out requirements, [and] the licensee's financial condition

47 C.F.R. § 1.2110(e)(4)(ii) (1997). Thus, licensees making installment payments had an automatic 90 days to make delinquent

⁴ 47 C.F.R. § 1.2110(e)(4)(ii) (1997). CTI's most recent grace period request was filed on March 21, 1997, and supplemented and amended by flings made on August 6, 1997 and October 8, 1997.

payments without being in default, and then if circumstances warranted, the licensee could request that the Commission grant the licensee an additional 90-180 days. Further, the Commission's rules do not limit the number of grace period requests that can be filed in conjunction with a delinquent installment payment.⁵ Therefore, if the Commission granted an initial 6 month grace period request, the licensee was entitled to file another request before the expiration of that period upon anticipation of default, thereby extending the period for making payment.

6. In the Third Report and Order, the Commission declared that from this point forward that it will no longer accept filings for grace period requests.⁶ Instead, licensees making installment payments will be given the automatic 90 day period contained in Section 1.2110(e)(4)(i) and an additional 90 day automatic grace period to make payment.⁷ If payment is not made

⁵ "Where the Commission grants a grace period and the default is not cured at the conclusion of such a grace period, . . . the FCC may in its discretion extend or grant additional grace periods where circumstances warrant." See Wireless Telecommunications Bureau Staff Clarifies "Grace Period" Rule for IVDS "Auction" Licensees Paying by Installment Payments, Public Notice, 10 FCC Rcd 10724 (1995).

⁶ Third Report and Order at ¶ 106.

⁷ Id. In the first 90 day period, licensees will be assessed a 5% late payment fee and in the second 90 day period a 10% late payment fee. Id.

before the expiration of these two periods, then the licenses will be canceled.

7. These grace period provisions only apply to existing licensees currently making installment payments, because the Commission is not using installment payment plans for auctions scheduled in the future. For licensees with pending grace period requests, the Commission will not consider them in default for those installment payments until the Bureau rules on the requests.⁸ If a request is denied, then the licensee "will have ten (10) business days to make the required payment or be considered in default."⁹ As demonstrated below, CTI's ability to submit grace period requests cannot be eliminated by retroactive rulemaking.

II. ARGUMENT

A. A Rule That Modifies The Terms Of Current Installment Payment Agreements With IVDS Licensees Is Impermissibly Retroactive

8. Prior to the July, 1994 IVDS auction, the Commission released the Fourth Report and Order establishing the rules and procedures for the IVDS auction.¹⁰ Specifically, the Commission permitted the use of installment payment plans for eligible small

⁸ Id. at ¶ 113.

⁹ Id.

¹⁰ In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-252, Fourth Report and Order, 9 FCC Rcd 2330 (1994) [hereinafter Fourth Report and Order].

businesses and stated that the general procedures provided in the Second Report and Order, which originally established Section 1.2110, applied.¹¹ In addition, the Commission pointed out that grace periods for licensees -- a provision only applicable to installment payment plans -- would be considered on a case-by-case basis.¹² Nothing in the Fourth Report and Order indicated that the terms and conditions of the installment payment plans would be subject to subsequent amendments of the Commission's rules.¹³

9. If the terms of the financing arrangement are uncertain and subject to change, then designated entities will not be able to structure a business plan or obtain investors, which runs counter to the Commission's intent "to promote the participation of designated entities in the provision of spectrum-based services."¹⁴

¹¹ In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348, 2389, 2391 (1994) [hereinafter Second Report and Order].

¹² Fourth Report and Order at ¶ 54 n.91.

¹³ "The Terms contained in the Commission Reports and Orders and in the Bidder Package are not negotiable. Prospective bidders are urged to read, review and analyze the auction documents prior to bidding at the auction, to make certain that they completely understand the provisions therein, and are willing to be bound by all of the Terms before making any bid." Bidder's Information Package at 1. A copy of the Commission's Fourth Report and Order was included with the Bidder's Information Package.

¹⁴ Fourth Report and Order at ¶ 53. In the Third Report and Order, the Commission states that in the past it has emphasized to

10. When choosing the installment payment program, eligible IVDS licensees entered into a financial agreement with the Commission for the payment of their license. The Commission issued a license in exchange for the licensee's promise to make installment payments. Former Section 1.2110(e) specifies the rights and obligations of the parties to that agreement. The Commission cannot unilaterally change the terms of the agreement by retroactive rulemaking. Therefore, the amended Section 1.2110(e) set forth in the Third Report and Order cannot apply to the Commission's financial agreements with IVDS licensees.

11. The Administrative Procedure Act ("APA") prohibits the Commission from applying a rule retroactively.¹⁵ A rule is impermissibly retroactive if it impairs the rights a party possessed when it acted, increases a party's liability for past

entities choosing the installment payment program that the terms will be governed by current Commission rules and regulations as amended. Third Report and Order at ¶ 111. However, this intent does not appear in IVDS. The Fourth Report and Order, establishing competitive bidding for IVDS, and subsequent public notices did not inform bidders and/or licensees that their financial agreement would be subject to modification. Further, unlike C block broadband PCS licensees, the Commission did not provide IVDS licensees with a "Note and Security Agreement" stating that the terms of the installment payment plan would be subject to amendments. Id.

¹⁵ 5 U.S.C. § 551(4) (1994); Georgetown University Hosp. v. Bowen, 821 F.2d 750, 757 (D.C. Cir. 1987). "[E]quitable considerations are irrelevant to the determination of whether the rule may be applied retroactively; such retroactive application is foreclosed by the express terms of the APA." Chadmoore Comm., Inc. v. FCC, 113 F.3d 235, 240 (D.C. Cir. 1997) (quoting Georgetown, 821 F.2d at 757).

conduct, or imposes new duties with respect to transactions already passed.¹⁶

12. Eligible IVDS licensees, such as CTI, entered into a financial agreement with the Commission for their licenses.¹⁷ As set forth in the bidder's information package and the IVDS licenses, section 1.2110 governed the rights and obligations of the parties concerning payment, default and grace period requests. The Commission did not inform licensees in the agreement or prior to entering the agreement that the terms of the installment payment plan would be subject to unilateral modification by the Commission. The rights and obligations of the parties vested at the auction. The Commission cannot eliminate or alter the rights of a party or impose new obligations in a subsequent rulemaking without violating the APA and the basic principles of contract law.

13. The amendment of Section 1.2110(e) by the Commission in the Third Report and Order impairs the right of a current IVDS licensees with an installment payment agreement to request for

¹⁶ Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994); Chadmoore, 113 F.3d at 240-41.

¹⁷ CTI does not assert that its license is a contract with the Commission. "[I]t is undisputed that an FCC license is not a contract between the licensee and the Commission." William L. Fishman, Property Rights, Reliance, and Retroactivity Under the Communications Act of 1934, 50 Fed. Comm. L.J. 1, 32 (1997). However, the Commission's grant of a license is consideration for a promise from eligible IVDS licensees to make installment payments, thus creating a financing agreement between the parties.

extensions of time for making payments and imposes new duties for IVDS licensees with financial agreements that were entered into in 1995. A grace period request does not guarantee an extension of time or a restructuring of payments, but it does provide for determination based on the unique circumstances of a license that is subject to judicial review. In addition, more than one request for an extension of a single installment payment can be filed.¹⁸ Circumstances may justify a greater extension of time than allowed under the new automatic grace period provisions, especially for IVDS licenses.¹⁹ Therefore, former Section 1.2110(e) has the potential to provide a licensee with more relief than the new automatic 90 day grace period provisions. Further, the amended Section 1.2110(e) imposes a penalty fee on licensees who make payment during either of the two automatic 90 day periods.²⁰ Under the old rule, a licensee is liable only for interest accrued during the initial automatic 90 day period and any grace periods that are granted by the Commission.²¹

¹⁸ See supra note 5.

¹⁹ As stated above, the IVDS industry has endured a dramatic turn of events that has caused the industry to reinvent itself.

²⁰ See supra note 7.

²¹ 47 C.F.R. § 1.2110 (e)(4)(ii) (1997).

14. Recent D.C. Circuit decisions regarding retroactivity are not applicable to CTI's situation.²² Those cases, with the exception of DIRECTV, dealt with pending license applications filed by individuals under rules that were subsequently modified in a Commission rulemaking. The Commission then proceeded to dismiss the pending applications. The court found that the Commission's dismissal of the applications under the amended rule was not impermissibly retroactive, because no right had vested in the applicant upon the filing of an application.²³ The applicants, therefore, were not entitled to have their applications granted by the Commission. In DIRECTV, the Commission's promise to allocate channels to petitioners in the future did not vest petitioners with a right in any specific channel.²⁴ The "promise" was not a promise at all, but a statement of policy resulting from an adjudicatory proceeding²⁵. Therefore, the Commission's subsequent rules to auction the channels instead of allocating them to the petitioners was not impermissibly retroactive.²⁶

²² See Chadmoore, 113 F.3d at 235; DIRECTV, Inc. v. FCC, 110 F.3d 816 (D.C. Cir. 1997); Hispanic Info. & Telecomm. Network v. FCC, 865 F.2d 1289 (D.C. Cir. 1989).

²³ Chadmoore, 113 F.3d at 241; Hispanic, 865 F.2d at 1294-95.

²⁴ DIRECTV, 110 F.3d at 826.

²⁵ Id. at 822, 826.

²⁶ Id.

15. In this case, the Commission is not attempting to apply the automatic grace period provisions to pending license applications filed by IVDS licensees. Further, CTI does not contend that the filing of a grace period request vests a licensee with certain rights. However, the financing agreements entered into by the Commission and IVDS licensees did vest in each party certain rights and obligations concerning the grant and payment for the license. The Commission cannot subsequently impair rights or alter obligations by a retroactive rulemaking.²⁷

III. CONCLUSION

17. For the reasons stated above, the Commission must reconsider its amendment of the grace period provisions contained in Section 1.2110(e)(4)(ii) as set forth in the Third Report and Order as applied to IVDS licensees like CTI. Applying the amended grace period provisions to the current IVDS licensees

²⁷ The Commission cannot change a licensee's winning bid amount after the auction, and thus, it cannot change the terms of payment after the parties enter into an agreement. If the Commission wants to change the terms of current agreements, then it must renegotiate the terms with current IVDS licensees making installment payments for a modification. 5 U.S.C. § 551(4); Landgraf, 511 U.S. at 280.

making installment payments will result in an impermissible retroactive rulemaking in violation of the APA.

Respectfully submitted,

COMMUNITY TELEPLAY, INC.

By: 

Richard S. Myers
Jay N. Lazrus

Their Attorneys

Myers Keller
Communications Law Group
1522 K Street, N.W.
Suite 1100
Washington, DC 20005
(202) 371-0789

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